CIMB Bank Bhd v Lee Kim Kee & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02–2171–09 OF 2012 AND P-02–2306–09 OF 2012
DAVID WONG, UMI KALTHUM AND ZAMANI A RAHIM JJCA
18 DECEMBER 2017

Limitation — Money deposited — Fraud and negligence — Whether suits filed against bank for negligence and/or fraud were time-barred — Whether plaintiff filed her suits within time after discovering negligence/fraud with reasonable diligence — Whether trial court's finding that bank had been wholly negligent correct — Whether bank officer's breach of duty of care to plaintiff and flagrant breach of normal banking procedures made bank vicariously liable for negligence — Whether fraudulent acts of partner of legal firm in siphoning off client's monies did not make his innocent partner or the firm liable — Whether deviant partner acting on a frolic of his own for personal interest and his actions were not in ordinary course of the business of the firm — Limitation Act 1953 ss 6(1)(a) & 29

An 88-year-old lady named Lee Kim Kee ('Lee') was awarded RM560,512.50 by the land office in 1992 as compensation for the acquisition of a piece of land of which she was the beneficial owner. Lee and her son engaged the services of a law firm, Messrs Chen, Leong and Co ('the firm') to arrange for the payment to her of the compensation sum. Although a cheque for the sum was received by the firm on Lee's behalf, Lee did not receive any news or updates from the firm about the matter even after she had sent two written enquiries to the firm in March and August 2000. In September 2000, Lee learnt from a newspaper report that one of the partners of the firm, Leong Sing Cheong ('Leong'), had absconded. In August 2002, Lee made enquiries at CIMB Bank Bhd ('CIMB') and discovered that Leong, using various fake documents, had caused the compensation sum to be put into a fixed deposit account and thereafter the sum together with accrued interest was transferred into the firm's client's account from where the money eventually disappeared. Lee lodged a police report against Leong and engaged new solicitors to file actions in the High Court to recover the compensation sum together with interest. One of the suits was against Leong and his partner, Chen Thim Wai (both of whom, in turn, added Malaysian National Insurance Bhd, MCIS Insurance Bhd and Tahan Insurance Malaysia Bhd as third parties). The second suit was against CIMB which, in turn, brought in the firm as a third party. The firm, in turn, added the same three insurance companies as fourth parties to the suit. Lee's case against CIMB was that Leong's use of fake documents to move the compensation monies about within CIMB could only have been possible if there was gross negligence on the bank's part. Lee's action against CIMB was premised on negligence, fraud and/or conspiracy and/or fraudulent collusion. CIMB

A contended that Lee's claims were time-barred both under ss 6(1)(a) and 29 of the Limitation Act 1953. CIMB also denied negligence on the ground it had at all material times acted in accordance with instructions given in a letter of authorisation purportedly given by Lee (which letter the High Court found had been forged by Leong). The High Court heard the two suits together, B allowed Lee's claim against CIMB (finding it wholly liable for negligence for breaches of duty of care and of established banking practice) and dismissed CIMB's claim against the firm and the firm's claim against the fourth parties. Lee's other suit against the partners of the firm and the firm's claim against the third party insurers was also dismissed as the trial court found that Leong's C fraudulent acts did not make his partner or the firm liable as he had acted on a frolic of his own for personal interests. The trial court's decision resulted in the instant two appeals by CIMB and Lee. The appeals were heard together.

D **Held,** dismissing CIMB's appeal and striking out Lee's appeal upon her decision to withdraw it:

(1) CIMB's defence of limitation was misconceived. Section 29 of the Limitation Act 1953 clearly stipulated that the limitation period shall not begin to run until the plaintiff had discovered the fraud or could with E reasonable diligence have discovered it. Although Lee was made aware that Leong had absconded via a newspaper report sometime in August 2001, that information alone did not and could not have constituted actual discovery of the negligence/fraud. At most, it was only an indicator that something was not right. Even before the news that her solicitor had F absconded, Lee had made several attempts to enquire about the compensation sum. This was evident from her letters dated 12 March 2000 and 5 August 2000 to the firm. The actual discovery of the negligence/fraud was only made after Lee, together with her new solicitors, with reasonable diligence had obtained all the relevant G documents from CIMB in August 2002. That same month, Lee lodged a police report on her findings. She filed the originating summons against the firm in 2003 — which was converted into a writ action in October 2006 — whilst the action against CIMB was filed in the year 2007. The two suits were clearly within the time prescribed by law and therefore H were not statute-barred both in negligence and/or fraud (see paras 38–40).

(2) The trial court was correct in its findings on the issue of negligence against CIMB. The bank had failed to exercise the care and skill I reasonably expected of it in the performance of its duties. The trial judge found the evidence of CIMB's fixed deposit officer (SD1) to be inconsistent, unsatisfactory and tainted with doubts and uncertainties. SD1 was supposed to be responsible for ensuring that all formalities and banking procedures were adhered to but she failed in her duties to

exercise reasonable care and caution and was negligent. Consequently, CIMB was vicariously negligent (see paras 43–45).

(3) The firm was not liable for Leong's fraudulent actions. He committed the fraudulent acts for his own personal interest. What he did was definitely not within the scope and boundaries of the partnership of the firm. Leong had acted on a frolic of his own and had siphoned out the compensation sum in his personal capacity and not in the name of the firm. His act of opening the fixed deposit account in the name of a fictitious person and then instructing CIMB to uplift the account and to have the principal sum and accrued interest credited into the firm's account were not acts done in the ordinary course of the business of the firm (see paras 48–52).

[Bahasa Malaysia summary

Seorang wanita tua berumur 88 tahun bernama Lee Kim Kee ('Lee') telah diberi award sebanyak RM560,512.50 oleh pejabat tanh pada tahun 1992 sebagai pampasan bagi pengambilan sebidang tanah yang beliau merupakan pemunya benefisial. Lee dan anak lelakinya telah mengguna khidmat perkhidmatan sebuah firma guaman, Tetuan Chen, Leong dan Rakan-Rakan ('firma itu') bagi pembayaran wang pampasan kepadanya. Walaupun firma itu telah menerima sekeping cek bagi pihak Lee, Lee tidak menerima apa-apa khabar atau perkembangan daripada firma tentang perkara itu, meskipun, beliau telah menghantar dua pertanyaan bertulis kepada firma pada bulan Mac dan Ogos 2000. Pada September 2000, Lee mendapat tahu daripada sebuah laporan surat khabar bahawa salah seorang daripada rakan kongsi firma itu, Leong Sing Cheong ('Leong'), telah melarikan diri. Pada Ogos, 2002, Lee membuat siasatan di CIMB Bank Bhd ('CIMB') dan mendapati bahawa Leong, dengan menggunakan pelbagai dokumen palsu telah menyebabkan jumlah pampasan yang hendak dimasukkan dalam suatu akaun simpanan tetap dan kemudiannya jumlah itu bersekali dengan faedah tertunggak dipindahkan ke dalam akaun klien firma itu yang sejak itu wang di dalam simpanan itu semakin berkurangan. Lee telah membuat laporan polis terhadap Leong dan mengguna khidmat peguambela baharu untuk memfailkan tindakan di Mahkamah Tinggi bagi mendapatkan semula jumlah pampasan bersama-sama dengan faedah. Salah satu tindakan saman itu adalah terhadap Leong dan rakan kongsinya, Che Thim Wai (kedua-duanya, sebagai balasan, menambah syarikat Malaysia National Insurangce Bhd, MCIS Insurance Bhd dan Tahan Insuran Malaysia Bhd sebagai pihak ketiga). Saman kedua adalah terhadap CIMB yang selanjutnya memasukkan firma sebagai pihak ketiga. Firma pula, selanjutnya, menambah tiga syarikat insuran sebagai pihak keempat dalam saman itu. Kes Lee terhadap CIMB adalah berkenaan penggunan dokumen palsu oleh Leong untuk memindahkan wang pampasan itu dalam CIMB hanya boleh dilaksanakan jika terdapat kecuaian bagi bank. Tindakan Lee terhadap CIMB adalah berdasarkan kecuaian, fraud dan/atau

konspirasi dan/atau pakatan sulit berfraud. CIMB menghujahkan bahawa tuntutan Lee telah dihalang oleh masa di bawah kedua-dua ss 6(1)(a) dan 29 Akta Had Masa 1953. CIMB juga menafikan kecuaian mereka atas alasan bahawa ia telah pada semua masa yang material bertindak mengikut arahan yang diberikan dalam surat memberi kuasa yang dinyatakan dibeli Lee (yang kemudiannya didapati oleh Mahkamah Tinggi telah dipalsukan oleh Leong). Mahkamah Tinggi mendengar kedua-dua saman bersekali, membenarkan tuntutan Lee terhadap CIMB (mendapati ia bertanggungan keseluruhannya bagi kecuaian bagi pelanggaran kewajipan berjaga-jaga dan amalan perbankan yang telah mantap) dan mengenepikan tuntutan CIMB terhadap firma dan tuntutan firma terhadap pihak keempat. Saman oleh Lee terhadap rakan kongsi firma itu dan tuntutan firma terhadap insurans pihak ketiga juga telah ditolak kerana mahkamah bicara mendapati bahawa tindakan fraud oleh Leong tidak menyebabkan rakan kongsinya atau firma itu bertanggungan memandangkan ia telah bertindak untuk minat peribadi. Keputusan mahkamah bicara telah menyebabkan kedua-dua rayuan ini bagi CMB dan Lee. Rayuan didengar bersama-sama.

Diputuskan, menolak rayuan CIMB dan mengenepikan rayuan oleh Lee apabila dia membuat keputusan untuk menarik balik:

(1) Pembelaan CIMB berhubung dengan had masa itu adalah suatu yang tersalah arah. Seksyen 29 Akta Had Masa 1953 dengan jelas menyatakan bahawa tempoh had masa tidak bermula hingga plaintif menjumpai fraud itu atau akan menjumpai fraud itu dengan usaha yang sewajarnya. Walaupun Lee telah mengetahui bahawa Leong telah melarikan diri melalui suatu laporan akhbar pada Ogos 2001, maklumat itu sahaja tidak boleh terjumlah sebagai penemuan sebenar tentang kecuaian/fraud. Jika ya sekalipun, ia hanyalah satu petunjuk bahawa ada sesuatu yang tidak betul telah berlaku. Lee telah mencuba beberapa kali untuk bertanya tentang jumlah pampasan itu sebelum berita tentang peguam caranya telah melarikan diri. Ini dapat dilihat melalui surat-suratnya bertarikh 12 Mac 2000 dan 5 Ogos 2000 kepada firma itu. Penemuan sebenar tentang kecuaian/fraud itu hanya dibuat setelah Lee, bersama-sama dengan peguam caranya yang baharu, dengan usaha yang sewajarnya telah mendapatkan semua dokumen yang relevan daripada CIMB pada Ogos 2002. Pada bulan yang sama, Lee telah membuat laporan polis tentang dapatannya. Dia memfailkan saman pemula terhadap firma itu pada 2003 — yang kemudiannya telah ditukar kepada suatu tindakan writ pada Oktober 2006 — manakala tindakan terhadap CIMB difailkan pada tahun 2007. Kedua-dua saman itu adalah jelas masih dalam masa yang ditetapkan oleh undang-undang dan oleh itu tidak dihalang secara statut dalam kedua-dua kecuaian dan/atau fraud (lihat perenggan 38–40).

(2) Mahkamah bicara adalah betul dalam dapatannya berkenaan isu

kecuaian terhadap CIMB. Pihak bank telah gagal melaksanakan kecermatan dan kemahiran yang semunasabahnya dijangkakan dalam pelaksanaan tanggungjawabnya. Hakim bicara mendapati bahawa keterangan pegawai deposit tetap CIMB (SD1) tidak konsisten, tidak memuaskan dan tercemar dengan keraguan dan ketidaktentuan. SD1 sepatutnya bertanggungjawab untuk memastikan bahawa semua formaliti dan tatacara perbankan dipatuhi tetapi dia telah gagal dalam tugasnya untuk melaksanakan kecermatan dan kehematan yang sewajarnya dan dia telah berlaku cuai. Akibatnya, CIMB adalah cuai secara vikarius (lihat perenggan 43–45).

(3) Firma tidak bertanggungan bagi tindakan fraud oleh Leong. Dia melakukan perbuatan fraud bagi maksud kepentingan peribadinya. Apa yang dilakukannya jelas bukan dalam bidang dan sempadan perkongsian firma itu. Leong telah bertindak secara sendiri dan menyeleweng jumlah pampasan itu atas kapasiti peribadinya dan bukan atas nama firma. Perbuatannya membuka akaun simpanan tetap atas nama orang yang tidak wujud dan kemudiannya mengarahkan CIMB untuk mengangkat akaun itu dan membuatkan jumlah prinsipal dan faedah terakru dikreditkan kepada akaun firma bukanlah tindakan yang dibuat dalam perjalanan biasa perniagaan firma itu (lihat perenggan 48–52).]

Notes

For cases on money deposited in general, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2589–2588.

Cases referred to

AmBank (M) Bhd v Kamariyah bt Hamdan & Anor [2013] 5 MLJ 448, CA (refd)

Legislation referred to

Limitation Act 1953 ss 6(1)(a), 29
Partnership Act 1961 ss 7, 12, 13

Appeal from: Civil Suit Nos 22–654 of 2006 and 22–320 of 2007 (High Court, Pulau Pinang)

Hoi Jack S'ng (Vivien Teh Yue Wen with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.
Tan Bak Lee (Tan Bak Lee & Co) for the first respondent.
M Kanesan (M Kanesan & Assoc) for the second respondent.
Loo Peh Fern (Param & Co) for the third, fourth and fifth respondents.

Umi Kalthum JCA:

INTRODUCTION

[1] These appeals originated from two separate suits at the High Court. The plaintiff filed two civil suits. The first civil suit is under Civil Suit No 22–654 of 2006 and the second civil suit is under Civil Suit No 22–320 of 2007.

[2] In the first civil suit, the plaintiff filed an action against one Leong Sing Cheong and one Chen Thim Wai in their capacities as the advocates and solicitors practicing under a law firm of Messrs Chen, Leong & Co as the first and second defendants respectively.

[3] The second defendant had in turn brought in Malaysian National Insurance Bhd, MCIS Insurance Bhd and Tahan Insurance Malaysia Bhd as the Third Parties.

[4] In the first civil suit, the plaintiff sought for the following reliefs:

(a) for the refund of RM560,512.50 together with interest to the plaintiff;

(b) the interest on the fix deposit of the said sum of RM560,512.50 from 7 November 1998–20 August 2002;

(c) the interest at the rate of 8%pa on the total sum claimed in prayers (a) and (b) from 21 August 2002 until full realisation; and

(d) costs.

[5] In the second civil suit, Civil Suit No 22–320 of 2007, the plaintiff named CIMB Bank Bhd (formerly known as Bank Bumiputra (M) Bhd/BBMB) ('the bank') as the defendant.

[6] The defendant had in turn brought in Messrs Chen, Leong & Co as the third party. Messrs Chen, Leong & Co then had brought in Malaysian National Insurance Bhd, MCIS Insurance Bhd and Tahan Insurance Malaysia Bhd as the fourth parties.

[7] In the second suit, the plaintiff sought for the following reliefs

(a) a declaration that the defendant/bank ('BBMB') had wrongfully and/or fraudulently credited a sum of RM560,512.50 being the amount stated on the said BBMB cheque dated 6 November 1998 into an unknown account;

(b) a sum of RM560,512.50 to be paid by the defendant/bank to the plaintiff;

(c) interest on RM560,512.50 to be calculated from 7 November 1998 until full settlement; and

(d) costs.

[8] Both of these civil suits were heard together at the High Court and the learned High Court judge had on 14 August 2012 allowed the plaintiff's (Lee Kim Kee) suit and dismissed the bank's claim against the third party and dismissed the third party's claim against the fourth parties with costs in Civil Suit No 22–230 of 2007.

[9] In respect of the decision of the learned High Court judge in Civil Suit No 22–230 of 2007 in finding the bank/defendant to be 100% liable, the plaintiff's claim against the defendants in Civil Suit No 22–654 of 2006 was dismissed with costs. The defendants' claim against the third party in that suit was also dismissed with costs.

[10] Aggrieved with the said decision, the bank/the defendant in Civil Suit No 22–230 of 2007 appealed against the decision of the learned High Court judge to this court in Appeal No 2171.The plaintiff in Civil Suit No 22–654 of 2006 also appealed against the decision of the High Court judge in Appeal No 2306.

[11] We, however, will deal with the Appeal No 2171 by the appellant/defendant/bank first against the decision of the learned High Court judge in allowing the first respondent's/plaintiff's claim for negligence and fraud and/or conspiracy and/or collusion of fraud for the unauthorised release of monies into an unknown account.

[12] For the purpose of Appeal No 2171, the parties shall be referred to as they were at the High Court in Civil Suit No 22–230 of 2007.

BACKGROUND FACTS

[13] The plaintiff was an old lady of 88 years of age. Back in 1992, being the beneficial owner to Lot 1872, Mukim 8, Seberang Perai Utara, she was awarded the a sum of RM560,512.50 by the Seberang Perai Utara Land Office for the acquisition of her late husband's land ('compensation sum').

[14] The plaintiff, together with her son, Ang Thy Hin (SP2) engaged the services of Messrs Chen, Leong and Co, a law firm in Bukit Mertajam, Pulau Pinang ('the firm'), to carry out the legal process in respect of the release of the compensation sum.

A **[15]** Pursuant to the Penang High Court order dated 28 August 1992 vide Originating Summons No 24–579 of 92, the compensation sum was to be paid in the plaintiff's name, Lee Kim Kee NRIC No 1674219, vide a Bank Bumiputra Malaysia Bhd 'non-negotiable' cheque No 350685. The said cheque was forwarded to Messrs Chen, Leong and Co.

B

[16] However, after having paid the legal fees, the plaintiff had not received any news or update from the firm in relation to the compensation sum. The plaintiff had sent two letters dated 12 March 2000 and 5 August 2000 to the firm inquiring about the compensation sum but the plaintiff received no reply.

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[17] On 14 September 2000, the plaintiff learnt via newspaper report that Mr Leong Sing Cheong had absconded. The plaintiff failed to get any information on Mr Leong Sing Cheong from the firm.

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[18] In August 2002, in an attempt to get further information on the compensation sum, the plaintiff together with her son, SP2, approached the bank at Lebuh Pantai, George Town, Penang. Only then the plaintiff discovered that the said compensation sum had been paid out vide BBMB Cheque No 350685 dated 6 November 1998 and the same had been collected by Messrs Chen, Leong and Co.

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[19] The plaintiff further learnt that the compensation sum was then deposited into a fixed deposit account opened under the name of Lee Kim Kee upon the letter of instruction and authorisation (D2) ('letter of authorisation') together with a copy of an identity card of Lee Kim Kee (P8) presented to the bank by the then plaintiff's lawyer, Mr Leong Sing Cheong.

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[20] The plaintiff was also informed by the bank that the said fixed deposit account had been uplifted and the whole sum together with its interest had been transferred into the client's account of Messrs Chen, Leong and Co.

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[21] With this information, the plaintiff had, on 10 August 2002, lodged a police report against the lawyer, Mr Leong Sing Cheong (P10). On 12 August 2002, a notice of demand was sent by the plaintiff's new solicitors, Messrs Tan Bak Lee, to Messrs Chen, Leong and Co for the refund of the compensation sum. The plaintiff then proceeded with the filing of the two separate civil suits at the High Court.

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I **[22]** It was the plaintiff's case that Mr Leong Sing Cheong had presented a faked letter of authorisation (D2) and a faked copy of an identity card (P8) which was purportedly claiming to be that of the plaintiff's and purportedly had instructed him to open a fixed/time deposit account under the name of the firm and further instructed and authorised the bank to release the fixed/time

deposit certificate to the firm for the firm's retention, custody and operation. D2 was allegedly signed by Lim Kim Kee and was witnessed by a notary public in Toronto, Canada by the name of Peter J Jenkins. The faked copy of the identity card bore the name of one Lim Kim Kee NRIC No 680116-08-6187/A 1674219.

[23] The plaintiff, vide the testimony of SP2, contended that the plaintiff had never given any authorisation to the firm to deposit the said cheque into BBMB fixed deposit account and/or transfer the said BBMB fixed deposit account to the firm. In addition to that, the plaintiff could only execute any document via thumb print. The plaintiff also had never been to Canada.

[24] Further, it was also the plaintiff's case that the bank had colluded with Mr Leong Sing Cheong to commit fraud due to the fact that the number of the plaintiff's identity card is different from the number of the identity card presented by the Mr Leong Sing Cheong to the bank. The plaintiff's identity card number is 250318-07-5056/1674219 meanwhile the faked identity card number is A 1674219. The letter 'A' does not appear in the plaintiff's identity card.

[25] The plaintiff alleged that Mr Leong Sing Cheong could not have deposited the plaintiff's money to the firm using faked documents without the assistance of the officer of the bank.

[26] The defendant/bank, contended that the plaintiff's claim was time barred under s 6(1)(a) of the Limitation Act 1953 as the fixed deposit account was created on 17 December 1998 and the plaintiff's suit against the defendant was only filed on 8 June 2007. The defendant claimed that nine years had passed since the accrual of the cause of action, that is, when the fixed deposit account was created. The defendant also contended that they had at all material times acted in accordance with the mandate under the letter of authorisation and thus was not negligent.

BEFORE THE HIGH COURT

[27] As we have indicated earlier, the learned High Court judge found the bank/defendant 100% liable for negligence in Civil Suit No 22–230 of 2007 and had allowed the plaintiff's claim. The learned judge had also consequently dismissed the defendant's/bank's claim against the third party and dismissed the third party's claim against the fourth parties with costs. In coming to his decision, the learned judge made the following findings of facts with regards to the defendant's liability:

(a) the plaintiff/SP1 impressed him as a simple and straight forward truthful witness and clearly was the victim of the fraudulent clearance of her cheque;

(b) the first witness for the bank/defendant (SD1), struck him as a witness whose evidence strained her own credibility. Her evidence was tainted with her 'did not notice', 'was not aware', 'was not certain', 'did not know' and yet she had conceded that it was the practice of the bank in insisting for the production of the original identity card from the applicant for the opening of the account. At one stage, SD1 said she only checked those required documents at a glance and yet had admitted that she would not have accepted them and processed the application if those documents were being presented by other person other than Mr Leong Sing Cheong, the panel lawyer for the bank;

(c) the letter of authorisation (D2) was faked and forged by Mr Leong Sing Cheong;

(d) the pre-signed application form for the opening of the fixed deposit (P3) was forged by Mr Leong Sing Cheong;

(e) the photocopy of the identity card bearing number A 1674219 with a photograph of a male person was forged by Mr Leong Sing Cheong;

(f) the plaintiff was not present at the time Mr Leong Sing Cheong presented all the relevant documents to the bank;

(g) SD1 had breached the established banking practice of insisting on the production of the original identity card of the applicant/customer for the opening of the account;

(h) SD1 was negligent in failing to notice the added alphabet 'A' preceding the number of the photocopy of the identity card presented compared with the identity card number printed on the BBMB cheque;

(i) SD1 had failed to notice that the particulars of the name, identity card number and address printed on the photocopied identity card were not in one straight vertical alignment;

(j) SD1 had proceeded to process the application only on the trust placed upon Mr Leong Sing Cheong, him being the panel lawyer for the bank;

(k) the verifying officer Athikah, although could not be located to testify, had likewise failed to check and verify the required documents thoroughly;

(l) the whole sum of the plaintiff's money in the said cheque that was transferred into the client's account of Messrs Chen, Leong and Co of the Penang Branch, in light of Mr Chen Thim Wai's evidence who said the same account was left with only a couple of hundred ringgit after the

disappearance of Mr Leong Sing Cheong, was withdrawn by Mr Leong Sing Cheong who then absconded with the said money; and

(m) SD1 was clearly in breach of her duty of care in processing the said documents presented by Mr Leong Sing Cheong despite the obvious and glaring discrepancies in them for the opening of the fixed deposit account, and vicariously the bank was in breach of its duty of care to the plaintiff resulting in the plaintiff's loss of her RM560,512.50.

[28] As for the joint liability of Mr Chen Thim Wai being a partner of Mr Leong Sing Cheong in the firm, the learned judge found that such joint obligation of the firm was only confined to liability arising out of contract but not for the fraudulent act of Mr Leong Sing Cheong alone which did not arise out of contract. Further, ss 7, 12 and 13 of the Partnership Act 1961 ('the Partnership Act') clearly qualified the liability of an innocent partner for the acts of his other partner if the acts are carried out in the ordinary course of business of the firm or in the usual way of business of the kind carried on by the firm. In this appeal, the learned judge found that the forgery perpetrated by Mr Leong Sing Cheong was clearly not within the ordinary course of business of the firm. That Mr Leong Sing Cheong had committed the fraudulent act on his own personal capacity and not in the firm's name and had siphoned out the sum of RM563,114.70 without the knowledge of Mr Chen Thim Wai.

[29] In view of his decision vis Civil Suit No 22–230 of 2007, and to recapitulate, the learned judge then dismissed the plaintiff's claim against the defendants in Civil Suit No 22–654 of 2006 with costs, and the defendants' claim against the third party in that suit was also dismissed with costs.

THE APPEAL

The first respondent/the plaintiff

[30] In respect of the first respondent/plaintiff, the defendant/appellant premised their appeal on the following grounds:

(a) the plaintiff's claim was time-barred under s 6(1)(a) of the Limitation Act 1953 ('the LA 1953'); and

(b) the defendant was not negligent and had only acted in accordance with the letter of authorisation.

Limitation

[31] The defendant argued that the plaintiff's claim was founded on, amongst others, the tort of negligence and fraud. The defendant submitted that the plaintiff's action was time-barred under and s 29 of the LA 1953.

A **[32]** The defendant first argued that s 6(1)(a) of the LA 1953 provides that actions founded on contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. In this appeal, the defendant alleged that the cause of action accrued when the fixed deposit account was created by Mr Leong Sing Cheong on 17 December 1998 but the
B plaintiff's action was only filed on 8 June 2007. There was a gap of eight years and six months between the accrual of the cause of action in tort and the filing of the suit. Thus, the defendant submitted that the plaintiff's action for negligence had been time-barred. The defendant further argued that the although the plaintiff may not have knowledge of the creation of the fixed
C deposit account, the plaintiff's knowledge is irrelevant under s 6(1)(a) of the LA 1953.

[33] As for fraud, the defendant submitted that the limitation period under
D s 29 of the LA 1953 applied. Although s 29 prescribes that the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it, the plaintiff's action would still be time-barred as the plaintiff could have with reasonable diligence discovered the creation of the fixed deposit account, and thus, the fraud could
E have been discovered at or around April 2001.

[34] The defendant argued that the plaintiff discovered her then solicitor, Mr Leong Sing Cheong had absconded in September 2000 and except for some enquiries, the plaintiff and her son SP2 did not do anything. The plaintiff
F only appointed a new solicitor to pursue the matter in April 2002. It was also not disputed that by early August 2002, the plaintiff had discovered the full extent of the matter.

[35] The defendant submitted that the plaintiff should have been more
G vigilant and proactive in pursuing the matter by enquiring regularly and conscientiously with the firm and when the replies she received from the firm had not been forthcoming, the plaintiff should have immediately appointed new solicitors to probe into the matter. But this was only done in April 2002, some twenty months later.

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[36] The defendant further argued that after appointing the new solicitors Messrs Tan Bak Lee & Co, it took them seven months to discover the full extent of the matter. Thus, had the plaintiff been more reasonably proactive and vigilant in pursuing the matter, the plaintiff should have been reasonably
I alerted by the news that her solicitor had absconded in September 2000. The plaintiff should have immediately appointed new solicitors and had she done that, the full extent of the matter would have been reasonably discovered by April 2001. The seven months period taken by Messrs Tan Bak Lee & Co to unearth the situation were used as an indicator in this analogy.

[37] Thus, the defendant submitted that, from April 2001 and the date of the filing of this suit on 8 June 2007, it had been more than six years and the action had already been time-barred even if the plaintiff invoked s 29 of the LA 1953. A

[38] We were of the view that the defendant's defence of limitation was misconceived. We reproduce herewith ss 6 and 29 of the LA 1953 as follows: B

> ACTIONS OF CONTRACT AND TORT AND CERTAIN OTHER ACTIONS
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> 6 Limitation of actions of contract and tort and certain other actions C
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> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
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> (a) actions founded on a contract or on tort; D
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> (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture ... E
>
> 29 Postponement of limitation period in case of fraud or mistake
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either —
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or F
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake, G
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

[39] We noted from the pleadings, the plaintiff had pleaded negligence and/or fraud in paras 8–9 of the amended statement of claim respectively. Section 29 of the LA 1953 clearly stipulates that the limitation period shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. In this case, we were of the opinion that although the plaintiff was made aware that her solicitor had absconded via a newspaper reporting sometime in August 2001, that information alone did not and could not have constituted actual discovery of the negligence/fraud. At most, it was only an indicator that something was not right. The plaintiff had, even before the news that her solicitor had absconded, made several attempts to H I

inquire about the compensation sum. This was evident vide her letters to the firm dated 12 March 2000 and 5 August 2000.

[40] We observed that the actual discovery of the negligence/fraud was only made after the plaintiff, together with her new solicitors, with reasonable diligence, had obtained all the relevant documents from the bank in August 2002. On 10 August 2002, the plaintiff lodged a police report on her findings. The filing of the originating summons was in the year 2003 at the Penang High Court in No 24–194 of 2003 and which was converted into a writ action in Civil Suit No 22–654 of 2006 vide a court order dated 19 October 2006; whilst the filing of the Civil Suit No 22–320 of 2007 against the bank was in the year 2007. These two actions were clearly within the time prescribed by law and therefore not statute-barred both in negliegence and/or fraud.

[41] We were of the view that it would not have been reasonable to contend that the accrual of the causes of action for negligence and/or fraud were to commence seven months after the plaintiff finding out that her solicitor had absconded. Despite the defendant's submission, we were of the considered opinion that the alleged seven month time frame from the plaintiff's knowledge of her solicitor's abscondment for the limitation period to begin and (as assessed by the defendant) for the plaintiff to have had reasonably discovered the full extent of the matter, was an entirely arbitrary calculation and wisdom acquired only after the facts were established.

[42] To illustrate the above, we refer to the Court of Appeal case of *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* [2013] 5 MLJ 448, per Jeffrey Tan JCA (as he then was), at para 22 where His Lordship stated as follows:

> [22] Likewise, in the instant case, the appellant on 1 September 1997 could not have discovered whatever negligence on the part of the respondent by the exercise of any reasonable diligence. Indeed, there was no reason for the appellant to suspect negligence, as effectively the respondents had advised the appellant that the charge was a valid charge. And the release of the loan only evinced that the appellant on 1 September 1997 could not have discovered that something could be amiss about the charge. The earliest that it could be said that the appellant should have suspected possible negligence in the preparation of the charge was when the appellant was served with the writ of summons dated 24 May 2000. Only then could it be said that the appellant should have discovered that the charge was under challenge. On 28 October 2005, the appellant applied for leave to issue the said third party notice, which leave was granted on 2 January 2006. On 20 January 2006, the said third party notice was issued. Evidently, the said third party notice was issued within six years from the date when the material facts on which the third party notice was based ought to have been discovered by the appellant by the exercise of reasonable diligence.

Negligence

[43] On the issue of negligence on the part of the defendant, we were in agreement with the learned High Court judge in his findings that the defendant was in fact negligent in the discharge of its duties. We observed from the facts of the case that the defendant had failed to exercise the care and skill to be reasonably expected of the defendant/bank in the performance of its duties.

[44] We were in agreement with the learned High Court judge in his findings of the evidence of the fixed deposit officer (SD1), which we also found to be inconsistent, unsatisfactory and tainted with doubts and uncertainties. SD1 who was supposed to be responsible in ensuring all the formalities and banking procedures were adhered to failed to do so. We see no reason to disturb the findings of facts by the learned judge when he found SD1 to be negligent and consequently the bank/defendant was vicariously negligent — see para 27 above.

[45] Thus, we were of the view that the defendant, through its attending officer, had failed to exercise reasonable care and caution in the aforesaid transaction. We unanimously affirmed the learned High Court judge's finding on the issue of negligence against the defendant.

The second respondent/the third party

[46] In relation to the second respondent/third party ('third party'), the defendant contended that the act of Mr Leong Sing Cheong bound the firm on the ground that Mr Leong Sing Cheong had at all material times represented himself as the plaintiff's solicitor and partner of the third party. These facts were indeed true and accurate.

[47] The defendant also argued that Mr Leong Sing Cheong's actions were done in the ordinary course of business of the third party and were directly linked to his professional capacity as a partner of the third party. All the transactions that had taken place would not have materialised if it were not acted or done in his capacity as partner of the third party.

[48] Once again, we found ourselves in agreement with the learned High Court judge in that the acts of Mr Leong Sing Cheong did not bind the third party. We were of the view that the commission of the fraudulent acts were by Mr Leong Sing Cheong acting on his own personal interest. In other words, we agreed with the learned High Court judge's finding that Mr Leong Sing Cheong had acted on his own frolic and had siphoned out the said

compensation sum in his personal capacity and not in the name of the third party.

[49] We were of the view that the act of opening the fixed deposit account by Mr Leong Sing Cheong in the name of the fictitious person and the act of instructing the bank/defendant to uplift the fixed deposit account and to have the principal sum and the accrued interest credited into the account of the third party were not done in the ordinary course of the business of the firm.

[50] We refer to s 7 of the Partnership Act and the same is reproduced as follows:

> 7 Power of partner to bind firm
>
> Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

[51] Thus, we were of the view that a partnership does not ipso facto become liable for all of the liabilities of its partner. What Mr Leong Sing Cheong did was definitely not within the scope and boundaries of the partnership of the firm and thus, the third party could not be made liable for that fraudulent transaction.

[52] We therefore were in agreement with the learned High Court judge's finding that the third party was not liable for Mr Leong Sing Cheong's fraudulent actions.

The third, fourth and fifth respondents/the fourth parties

[53] At the hearing of the appeal, counsel for the third, fourth and fifth respondents/fourth parties submitted that they were brought into the proceedings at the High Court by the third party/the firm and the third party did not appeal against the decision of the learned High Court judge. As such, they should not have been named as parties in this appeal. The defendant's/bank's counsel submitted that the fourth parties were brought in only as the nominal parties.

CONCLUSION

[54] Based on the aforementioned reasons, we unanimously decided Appeal No 2171 as follows:

(a) in respect of the appellant's/bank's/defendant's appeal against the first respondent/plaintiff, we dismissed the appeal with costs of RM20,000;

(b) in respect of the appellant's/bank's/defendant's appeal against the third party, we dismissed the appeal with costs of RM20,000;

(c) in respect of the appellant's/bank's/defendant's appeal against the fourth parties, we dismissed the appeal with total costs of RM10,000; and

(d) deposit was to be refunded.

[55] This Appeal No 2171 was heard together with Civil Appeal No P-02–2306–09 of 2012. In view of our decision in Civil Appeal No P-02–2171–09 of 2012, the appellant/plaintiff in Appeal No 2306 then withdrew her appeal with no order as to costs. Seeing that there was no objection to the appellant's/plaintiff's proposal, we unanimously struck off Appeal No 2306 with no order as to costs and ordered the deposit to be refunded.

Appellant's appeal dismissed; respondent's appeal struck out.

Reported by Ashok Kumar